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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STUART HACK COMPANY, *et al.*,
Petitioners,

v.

RICHARD SHOFER,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether ERISA pre-empts state law tort and contract claims against a nonfiduciary professional that are related to and premised upon an employee benefit plan.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals of Maryland, whose judgment is sought to be reviewed, included Richard Shofer (the Respondent); The Stuart Hack Company, a Maryland corporation (a Petitioner); Stuart Hack (a Petitioner), and Grabush, Newman & Company, P.A., a Maryland professional corporation. The corporate parties have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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Petition for Writ of Certiorari to the Court of Appeals of Maryland

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Stuart Hack Company and Stuart Hack, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland, filed in the proceedings on September 17, 1991.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in the official Maryland Reports at 324 Md. 92 (unofficially at 595 A.2d 1078) and is included herein as Appendix A.

JURISDICTION

The opinion of the Court of Appeals constituting its judgment was filed September 17, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1357(a).

STATUTES INVOLVED

The relevant portions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001-1461, are set forth below.

Section 402(c) of ERISA (29 U.S.C. § 1102(c)) provides in pertinent part as follows:

> Sec. 402. * * * (c) Any employee benefit plan may provide * * * (2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in Section 405(c)(1), may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan * * *.

Section 409(a) of ERISA (29 U.S.C. § 1109(a)) provides in pertinent part as follows:

> Sec. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. * * *.

Section 502(a) of ERISA (29 U.S.C. § 1132(a)) provides in pertinent part as follows:

> Sec. 502. (a) A civil action may be brought—
>
> (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 409;

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan * * *.

Section 502(e) of ERISA (29 U.S.C. § 1132(e)) provides in pertinent part as follows:

> Sec. 502. * * * (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section. * * *.

Section 514(a) of ERISA (29 U.S.C. § 1144(a)) provides in pertinent part as follows:

> Sec. 514. (a) Except as provided in subsection (b) of this Section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). * * *.

Section 514(c) of ERISA (29 U.S.C. § 1144(c)) provides in pertinent part as follows:

> Sec. 514. * * * (c) For purposes of this section: (1) the term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *.

STATEMENT OF THE CASE

This case originated in an action brought by the Respondent, Richard Shofer ("Shofer"), in the Circuit Court for Baltimore City, Maryland. The action sought damages against two defendants, The Stuart Hack Company and its president, Stuart Hack, the Petitioners

herein ("Petitioners"). Because the action was dismissed without trial, the record of the proceedings below was limited to factual allegations and discovery materials (App. 5a).

Shofer is the sole stockholder and president of Catalina Enterprises, Inc. ("Catalina"), a used car dealer trading as Crown Motors (App. 3a, 28a). In 1971, Catalina established a qualified pension plan for its employees (App. 3a, 28a). Shofer has been the sole trustee of the Catalina plan since its inception and is also a participant (App. 3a, 28a).

Petitioners are professional actuaries and pension plan consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of plan assets (App. 4a, 27a, 28a, 41a). Petitioners prepared the Catalina pension plan and all subsequent amendments (App. 4a, 33a). Since the inception of the Catalina plan, Petitioners have served as its plan administrators (App. 4a, 8a, 34a, 36a, 38a, 39a). Petitioners rendered professional assistance to the Catalina plan, including the preparation of documents related to plan administration and other duties delegated by Shofer as plan trustee (App. 8a, 28a, 34a, 38a, 41a). However, as was clarified in discovery, Petitioners exercised no control or discretion over the Catalina plan or its assets (App. 8a).

It is alleged that Petitioners advised Shofer or Catalina as to the tax implications of contemplated plan transactions (App. 4a, 28a, 30a, 31a, 32a, 36a). The Catalina plan allegedly obligated Petitioners to provide counsel and assistance to Shofer, as trustee, as to plan benefits including the trustee's ability to loan money to participants in accordance with specific provisions of the plan. (App. 34a, 35a, 36a, 38a, 40).

By December 31, 1983, Shofer had accumulated $209,415.95 in his own voluntary account in the Catalina plan (App. 28a). Subsequently, he sought Petitioners' ad-

vice whether to borrow money from the plan or use the plan's assets as collateral for a loan (App. 4a, 28a).

Petitioners responded in a four-paragraph opinion letter of August 9, 1984 (App. 4a, 28a, 44a-45a), which forms the centerpiece of ensuing litigation. The letter discussed the Catalina pension plan (App. 44a) and advised Shofer, "you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account," as long as the loan terms were reasonable as to interest rate and pay back period (App. 45a). The letter did not mention possible tax implications of borrowing from the plan (App. 4a, 29a).

Between 1984 and 1986 Shofer borrowed $375,000 from his voluntary account in the Catalina plan (App. 4a, 29a). He was later informed by his and Catalina's accountants, Grabush, Newman & Company, P.A. ("Grabush"), that his borrowings were taxable as income and constituted prohibited transactions (App. 4a, 29a). As a result of the loan transactions, Shofer incurred additional income taxes, excise tax, interest, penalties and other related expenses (App. 11a, 29a, 30a).

On April 11, 1988, Shofer sued Petitioners in the Circuit Court for Baltimore City (App. 5a). Petitioners impleaded Grabush as a third-party defendant (App. 5a).

Shofer's Second Amended Complaint (App. 27a-42a), filed on August 8, 1990 (App. 43a), contained eight counts: Count I (App. 29a-30a) and Count II (App. 30a-31a) asserted claims under Maryland law for alleged negligence and breach of contract for advising Shofer that he could borrow up to 100% of his Catalina plan account without adverse tax consequences (App. 30a, 31a). Count III (App. 31a-32a) alleged that the same advice was a breach of Petitioners' fiduciary duty to Shofer (App. 32a). Counts IV through VIII (App. 32a-42a) each invoked the ERISA enforcement provision of 29 U.S.C. § 1132(a)(1)(B). Each ERISA count alleged

that the loan advice given by Petitioners was "in breach of their fiduciary duty" under the Catalina plan and "constituted a deprivation of Shofer's right" under the terms of that plan (App. 35a, 36a, 38a, 40a, 41a).

All eight counts of the Second Amended Complaint were predicated on a common core of operative facts, designated as "facts common to all counts" (App. 27a). The Maryland common law and ERISA claims were identical in that liability was premised in every count upon Petitioners' advice to Shofer that "he could borrow up to 100% of his voluntary account in the Plan" without mention of any adverse tax consequences (App. 30a, 31a, 32a, 35a, 36a, 38a, 39a, 41a). The compensatory damages sought under the ERISA counts were exactly the same as those sought in the Maryland law causes of action (App. 5a).

On August 24, 1990, Petitioners moved to dismiss Shofer's Second Amended Complaint (App. 46a-47a). Specifically, the motion invoked 29 U.S.C. § 1144(a) and stated that Counts I, II and III were pre-empted by ERISA "because they 'relate to' an employee benefit plan." (App. 46a). With respect to the ERISA claims in the remaining counts, the motion asserted that those counts "fall within the exclusive jurisdiction of the federal courts, and this [Maryland] court therefore lacks subject matter jurisdiction over these claims" by reason of 29 U.S.C. § 1132(e)(1). (App. 47a).

On October 12, 1990, the Circuit Court granted Petitioners' motion and dismissed Shofer's Second Amended Complaint with prejudice (App. 6a, 26a). The court determined that Shofer's claims "necessarily relate to ERISA, relate to the pension plan, and therefore, are preempted" (App. 25a).[1] Shofer appealed to the Court of

[1] Shortly after his Second Amended Complaint was dismissed, Shofer filed a similar eight-count complaint in the United States District Court for the District of Maryland. On January 3, 1991, summary judgment was entered against Shofer because his claims

Special Appeals of Maryland (App. 6a). On February 26, 1991, prior to that Court's consideration of the merits, the Court of Appeals of Maryland on its own motion issued a writ of certiorari (App. 6a).[2]

On September 17, 1991, the Court of Appeals rendered its decision on what it regarded as "issues of exclusive federal jurisdiction and of federal pre-emption of State law" under ERISA (App. 1a). In part III of its opinion, the Court found it unclear from the record precisely what Petitioners' responsibilities were as plan administrators (App. 8a). Accordingly, Petitioners were treated as "non-fiduciary consultants to the plan" (App. 9a) for purposes of pre-emption analysis.

In part IV of its opinion, the Court of Appeals focused upon the nonfiduciary status ascribed to Petitioners and held that the State common law claims were not pre-empted by ERISA. The Court was especially concerned that a pre-emption holding might not leave Respondent any remedy at all "because there can be a gap between the scope of ERISA remedies and the sweep of ERISA pre-emption." (App. 14a). It concluded:

> * * * When [Petitioners'] nonfiduciary status is considered along with the conduct at issue and the type of damages sought, we do not believe that Congress

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were barred by the applicable statutes of limitations. *Shofer v. Stuart Hack Co.*, 753 F. Supp. 587, 588 (D. Md. 1991), *appeal pending* (4th Cir. No. 91-1024). In so ruling, the District Judge found it "clear as a matter of law that the plaintiff's claims * * * must be read as being cognizable only under the exclusive federal jurisdictional grant in 29 U.S.C. § 1132(e)(1)." Thus, "the state court was plainly without jurisdiction here *ab initio*" with respect to any of Shofer's claims. *Id.*, 753 F. Supp. at 588.

The Court of Appeals of Maryland acknowledged the federal court disposition and the pending appeal (App. 6a n.3). However, no notice was taken of the quoted passages from the federal opinion (753 F. Supp. at 588).

[2] The certiorari order of February 26, 1991, is reported. *Shofer v. Stuart Hack Co.*, 322 Md. 132, 586 A.2d 14 (1991).

> intended to pre-empt this particular action. The conduct at issue here is simply a failure to give competent tax advice about an ERISA distribution. * * * It is hard to imagine that Congress intended to pre-empt an action in which all potential damages would be paid by a nonfiduciary and would not inure to a plan. Where the alleged negligence of a nonfiduciary plan administrator is as removed from the plan as here, and "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to pre-empt a whole panoply of state law in this area." [Citation omitted].

(App. 18a).

The Court of Appeals proceeded to delete from Counts I and II the specific references therein (App. 29a, 30a, 31a) to excise taxes attributable to "prohibited transaction" loans from an ERISA plan (App. 20a). With that modification, the judgment on those counts was vacated and the case was remanded to the Circuit Court for further proceedings on the State law tort and contract claims (App. 22a-23a). However, the Court of Appeals treated the claim in Count III for "breach of fiduciary duty" as pre-empted by ERISA (App. 21a.n6).

Finally, in part VI of its opinion, the Court of Appeals affirmed the judgment for Petitioners on ERISA Counts IV through VIII (App. 21a-22a). The Court agreed that those counts asserted "a civil action recognized by § 1132 (a)(2), which § 1132(e)(1) assigns to exclusive federal subject matter jurisdiction." (App. 22a).

REASONS FOR GRANTING THE WRIT

CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT OF AUTHORITY ON THE IMPORTANT FEDERAL QUESTION OF WHETHER ERISA PRE-EMPTS STATE LAW CLAIMS AGAINST NONFIDUCIARY PROFESSIONALS

The decision below raises a significant question of the extent to which ERISA pre-empts State common law tort and contract claims asserted against nonfiduciary plan administrators, consultants, and similar professionals. This is a significant question on which federal courts are sharply divided. This case presents the first opportunity for the Court to resolve this growing controversy and ascertain the intent of Congress with respect to nonfiduciary professionals.

In its pre-emption analysis, the Court of Appeals of Maryland classified the Petitioners "as nonfiduciary consultants to the [Catalina] plan." (App. 9a). That determination is not questioned here. As was alleged below, it is accurate to describe Petitioners "as professional actuaries and consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans." (App. 27a).

Nevertheless, Petitioners do challenge the relevance to ERISA pre-emption of their assumed status as nonfiduciaries. If the State law claims against them "relate to" the Catalina plan, as Petitioners submit, then those claims are pre-empted by § 514(a) of ERISA, 29 U.S.C. § 1144(a), irrespective of their nonfiduciary status.

A. State Law Professional Liability Claims "Relate To" An Employee Benefit Plan And Are Pre-Empted By ERISA, If The Claims Are Premised On The Existence Of The Plan

By now it is settled that State common law claims are pre-empted by 29 U.S.C. § 1144(a) if they "relate to" an ERISA plan. *Ingersoll-Rand Co. v. McClendon*, 498 U.S.

——, 111 S.Ct. 478 (1990) (claim of wrongful discharge based on pension-defeating motive, seeking damages but not lost pension benefits); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (common law contract and tort claims for improper processing of benefit claims). Such a common law claim " 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). "The pre-emption clause is conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. ——, 111 S.Ct. 403, 407 (1990). Pre-emption applies when "the existence of a pension plan is a critical factor in establishing liability" under State law. *Ingersoll-Rand*, 111 S.Ct. at 483.

The Court of Appeals of Maryland recognized *Ingersoll-Rand* as an "illustration" of ERISA pre-emption (App. 10a), but encountered apparent difficulty in applying the declared standards to Maryland common law claims of professional liability. As alleged in the Second Amended Complaint, those claims were predicated upon Respondent's request (as trustee/participant of the Catalina plan) for Petitioners' "advice as to whether it would be advisable to borrow money from the Plan or to use the Plan's assets as collateral for a loan." (App. 28a). However, in translating these allegations, the Court of Appeals was at pains to shift focus away from Petitioners' advice with respect to borrowing rights under the Plan. It stressed the tax consequences of such advice. The opinion refers to "the claim of negligent tax advice to a participant concerning borrowings from a plan," indicating "simply a failure to give competent tax advice about an ERISA distribution." (App. 18a). The Court was of the view that "borrowing from the Catalina plan is not of 'central concern' to the policies underlying, or administration of, ERISA." (App. 17a).

Even accepting this cramped view of the pleadings, the Maryland common law claims are based upon alleged mis-

advice regarding a participant's borrowing rights under an ERISA pension plan. It is thus beyond dispute that these State law claims were "premised on the existence of a pension plan." *Ingersoll-Rand*, 111 S.Ct. at 483. *See Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 509 (10th Cir. 1991) ("common law tort and breach of contract claims are preempted by ERISA if the factual basis of the cause of action involves an employee benefit plan"). Borrowing money from a pension plan is regulated by specific ERISA provisions, 29 U.S.C. §§ 1106(a)(1)(B) and 408(b)(1),[3] and thus should be regarded as a central concern of ERISA.[4] Professional advice on that subject necessarily related to the Plan. Moreover, the Catalina plan governed the relationship of the parties and was the source of the professional duties attributed to Petitioners. *See Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 417 (9th Cir. 1990).

The State law claims, as here alleged, implicate "professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans." (App. 27a, 28a). *See* 29 U.S.C. § 1102(c)(2). Varying standards of professional liability, as applied to pension plans, are a hindrance to ERISA's objectives. Congress intended to "establish pension plan regulation as 'exclusively a federal concern.'" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). *See Ingersoll-Rand*, 111 S.Ct. at 482.

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[3] Loans to ERISA plan participants are also regulated by 29 C.F.R. § 2550.408(b)-1.

[4] Viewed as a "claim of negligent tax advice" (App. 18a), such a claim would still "relate to" an employee benefit plan. The tax consequences of improper borrowing from a plan are prescribed by § 4975 of the Internal Revenue Code, 26 U.S.C. § 4975, which was enacted in 1974 as § 2003 of ERISA. *Latterman v. United States*, 872 F.2d 564, 567 (3rd Cir. 1989). Manifestly, any tax liability incurred by Respondent under § 4975 necessarily related to his borrowing from the Catalina plan. *See Hockaden & Assocs., Inc. v. Commissioner*, 800 F.2d 70, 71 (6th Cir. 1986).

B. Maryland Law Cannot Supplement The Remedies That Congress Has Provided To Enforce Rights Of ERISA Participants

Moreover, this case presents the Court with its first opportunity to consider ERISA pre-emption in the context of State law claims prosecuted in conjunction with an ERISA civil enforcement action. The Court of Appeals of Maryland described the five ERISA counts as asserting "a civil action recognized by § 1132(a)(2), which § 1132(e)(1) assigns to exclusive federal subject matter jurisdiction." (App. 22a). That was an apt description. *See, e.g., Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991). As the Court of Appeals noted (App. 6a.n3), those ERISA claims are still being pressed by Respondent in ongoing federal litigation. *Shofer v. Stuart Hack Co.*, 753 F.Supp. 587, 588 (D.Md. 1991), *appeal pending* (4th Cir. No. 91-1024).

The State law claims of professional liability arise from a common core of operative facts and are based upon the same alleged misconduct supporting the ERISA enforcement action. In other words, each of Respondent's State law claims "not only 'relates to' an employee benefit plan but is at its core an ERISA claim." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

The decision below rationalizes the ERISA enforcement action "essentially as an alternative pleading" (App. 21a), a mere option to be pursued if Respondent's State law claims are pre-empted. However, this Court recognizes no State law "alternatives" to the ERISA enforcement mechanism. It has declared repeatedly that "Congress intended § 502(a) [29 U.S.C. § 1132(a)] to be the exclusive remedy for rights guaranteed under ERISA * * *." *Ingersoll-Rand Co. v. McClendon, supra*, 111 S.Ct. at 485. *See Pilot Life Ins. Co. v. Dedeaux, supra*, 481 U.S. at 54.

This conjunction of ERISA and Maryland common law claims should have been dispositive of the pre-emption question. Where rights are secured by ERISA, State law remedies may not be pursued. It "would make little sense if the remedies available to ERISA partcipants and beneficiaries under § 502(a) [29 U.S.C. § 1132(a)] could be supplemented or supplanted by varying State laws." *Pilot Life*, 481 U.S. at 56. "The pre-emption provision was intended to displace all State laws that fall within its sphere, even including State laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

By disregarding these precepts, the decision below stands against federal authority. *See, e.g., Williams v. Wright*, 927 F.2d 1540, 1549 (11th Cir. 1991) ("our holding that these benefits are covered by ERISA also resolves [by pre-emption] appellant's State law claims"); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990) ("this provision pre-empts State law claims brought in conjunction with an ERISA civil enforcement action"). *See also Cox v. Eichler*, 765 F.Supp. 601, 605 (N.D.Cal. 1990) (ERISA "plaintiffs may not assert pre-empted State law claims, even in the alternative").

C. Whether ERISA Pre-Empts State Law Claims Against Nonfiduciaries Poses A Controversy Which This Court Should Resolve

The Court of Appeals of Maryland sought to rescue the State law professional liability claims against Petitioners. It viewed ERISA pre-emption as a "morass" (App. 10a, 11a) to be carefully avoided. The chosen vehicle for escape was the Court's relegation of Petitioners to the status of "nonfiduciary consultants to the plan" (App. 9a). By depicting Petitioners as outsiders, the decision below proceeded in a scholarly fashion to preserve Maryland common law remedies for alleged professional negligence against "the expansive sweep of the pre-emption

clause." *Pilot Life Ins. Co. v. Dedeaux, supra*, 481 U.S. at 47.

This Court has never suggested that ERISA pre-emption is conditioned upon the defendant's status as a fiduciary. In *Ingersoll-Rand*, for example, the pre-empted wrongful discharge claim was asserted against the employer, with no mention of fiduciary status. The employer's liability certainly "did not turn on the construction, interpretation or application of ERISA or of a plan" (App. 12a); rather the discharge claim was pre-empted because liability, as here, was "premised on the existence of a pension plan." 111 S.Ct. at 483. Nothing in *Ingersoll-Rand* suggested that "any recovery would have become an asset of the plan" (App. 12a). All potential damages were sought by the discharged employee for himself "and would not inure to a plan" (App. 18a). As this Court concluded, "it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits." *Id.*, 111 S.Ct. at 486.[5]

The fiduciary—nonfiduciary distinction was the cornerstone of the decision below (App. 6a-9a). It was derived from "considered *dicta*" (App. 11a) in *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146 (3rd Cir. 1989). In *Painters*, ERISA plan trustees brought a federal court action against the independent accounting firm which had failed to uncover fraud by the pension plan administrator. Because the accounting firm was not an ERISA fiduciary, a Third Circuit panel upheld dismissal of an ERISA action for breach of fiduciary duties. The panel also declined to create an implied cause of action under ERISA for professional malpractice. In response to the trustees' argument that ERISA pre-emption of their State law

[5] *See Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1292-95 (5th Cir. 1989) (rejecting contention that pre-emption was avoided because former employee was not seeking recovery from the plan or its assets, but only from his former employer).

malpractice claims would leave no remedy at all, the panel sought to allay that concern:

> We feel * * * that, *in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action*, Congress did not intend to pre-empt a whole panoply of State law in this area. Thus, we conclude that ERISA does not generally pre-empt State professional malpractice actions.

Id. (emphasis added). *Accord, Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 540 (7th Cir. 1991) (ERISA does not supplant State law malpractice claims against nonfiduciary professionals).

The Court of Appeals of Maryland agreed with that conclusion from *Painters* and applied it to the case at hand (App. 12a). The Court embraced "the wisdom of the *Painters* rationale" in support of its own holding (App. 18a). Its opinion concluded that since the conduct of Petitioners, as nonfiduciaries, "is not regulated by ERISA" (App. 19a), then State laws regulating such conduct are not pre-empted by ERISA.

In addition to *dicta* from the Third and Seventh Circuit opinions, there is a widespread misconception that claims against fiduciaries will not be pre-empted unless ERISA provides a remedy for the alleged misconduct. In this regard, the decision below is supported by direct holdings of several lower federal courts. *Kelly v. Pan-American Life Ins. Co.*, 765 F.Supp. 1406, 1410 (W.D.Mo. 1991) (acknowledging that "Courts are split on the issue of whether ERISA pre-empts State law causes of action against a nonfiduciary"); *Sparks v. Mo-Kan Iron Workers Pension Fund*, 765 F.Supp. 566, 568 (W.D.Mo. 1990); *Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F.Supp. 926, 932-34 (W.D.Ark. 1990); *Jordan v. Reliable Life Ins. Co.*, 694 F.Supp. 822 (N.D.Ala. 1988), supplemented, 716 F.Supp. 582 (N.D.Ala. 1989); *Southern California Meat Cutters Unions v. Investors*

Research Co., 687 F.Supp. 506, 508-10 (C.D.Cal. 1988); *Isaacs v. Group Health, Inc.*, 668 F.Supp. 306, 313 (S.D.N.Y. 1987); *Munoz v. Prudential Ins. Co. of America*, 633 F.Supp. 564, 570-72 (D.Colo. 1986).

These cases assume that ERISA does not regulate nonfiduciaries or provide a remedy for a nonfiduciary's misconduct. *Sparks*, 765 F.Supp. at 568. Accordingly, the cases draw "the reasonable conclusion that ERISA preemption was only intended to go as far as the remedies for which ERISA provides *i.e.*, fiduciary misconduct." *Southern California Meat Cutters Unions*, 687 F.Supp. at 509.

The opposite position is taken by the Fifth, Eighth, Ninth, and Eleventh Circuits. Classification of the defendant as a fiduciary or nonfiduciary should not affect the ERISA pre-emption analysis. *Light v. Blue Cross & Blue Shield of Alabama, Inc.*, 790 F.2d 1247, 1248-49 (5th Cir. 1986) (ERISA pre-empts State law claims against nonfiduciary administrators of self-funded employee benefit plans); *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, —— F.2d ——, No. 90-5131, 90-5164 (8th Cir. Nov. 19, 1991), available on WESTLAW 1991 239612 (nonfiduciary plan administrator); *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 417-18 (9th Cir. 1990) (nonfiduciary plan administrator); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564-65 (11th Cir. 1987) (nonfiduciary plan administrator). *See also Gadsby v. Health Ins. Admin., Inc.*, 168 Ill.App.3d 460, 119 Ill.Dec. 203, 522 N.E.2d 865, 869 (1988) (nonfiduciary insurance claims administrator); *Johnson v. Reserve Life Ins. Co.*, 761 F.Supp. 93, 95-96 (C.D. Cal. 1991) (nonfiduciary employee benefit consultant); *Casper Air Service, Inc. v. Sun Life Assur. Co. of Canada*, 752 F.Supp. 1005, 1007-09 (D.Wyo. 1990) (nonfiduciary plan administrator); *Rollo v. Maxicare of Louisiana, Inc.*, 695 F.Supp. 245, 249 (E.D.La. 1988) (nonfiduciary plan administrators).

These cases conclude that ERISA pre-emption does not depend upon whether or not suit is brought against a

fiduciary, but rather, upon whether the State law claims asserted "relate to" an ERISA plan. "Section 1144(a) pre-empts *all* State laws insofar as they relate to employee benefit plans and is not limited to State law as applied only to plan fiduciaries." *Howard v. Parisian, Inc., supra*, 807 F.2d at 1565 (italics in original). Moreover, because 29 U.S.C. § 1132(a)(3) allows equitable relief against fiduciaries and nonfiduciaries alike, "[t]he existence of some remedy for misconduct by nonfiduciaries suggests that Congress intended to include their behavior under ERISA." *Gibson v. Prudential Ins. Co. of America, supra*, 915 F.2d at 417.

In any event, it is irrelevant to the pre-emption analysis that ERISA does not provide a damage remedy for nonfiduciary misconduct. *Gibson*, 915 F.2d at 418; *Howard*, 807 F.2d at 1565. The decision below and cases like it engraft on 29 U.S.C. § 1144(a) the unsanctioned requirement that pre-emption will be denied "in the absence of an explicit corresponding provision in ERISA" allowing a malpractice remedy (App. 18a).

However, this Court has rejected such an argument. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under State law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux, supra*, 481 U.S. at 54. *See also Caterpiller, Inc. v. Williams*, 482 U.S. 386, 391n.4 (1987) (rejecting suggestion that federal remedy is a prerequisite to State law pre-emption). Certainly this is the prevailing view among federal circuits. *See, e.g., Cromwell v. Equicar-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) (it is irrelevant "to an analysis of the scope of federal pre-emption that appellants may be left without a remedy"); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991) ("ERISA's pre-emption provision bars State law causes of action even though such pre-emption may leave a vic-

tim of fraud or misrepresentation without a remedy"); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989) ("availability of a federal remedy is not a prerequisite for federal pre-emption"), *cert. denied*, 498 U.S. ——, 111 S.Ct. 579 (1990).

We submit that the decision below, and the line of cases supporting it, are mistaken in concluding that ERISA was not intended to pre-empt State law claims against nonfiduciary professionals. Such a limiting construction of 29 U.S.C. § 1144(a) is neither justified by its expansive text nor by legislative history. Indeed, this Court has rejected any limiting construction of § 1144(a) as would confine its scope to State law claims of fiduciary misconduct:

> * * * [T]o interpret the pre-emption clause to apply to State laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and *fiduciary duties*, would be incompatible with the provision's legislative history because the House and Senate versions of the bill that became ERISA contained limited pre-emption clauses, applicable only to State laws relating to specific subjects covered by ERISA. These were rejected in favor of the present language in the Act, "indicat[ing] that the section's pre-emptive scope was as broad as its language." *Shaw v. Delta Air Lines*, 463 U.S. at 98, 103 S.Ct. at 2901.

FMC Corp. v. Holliday, 498 U.S. ——, 111 S.Ct. 403, 408 (190) (italics added, footnote omitted).

CONCLUSION

Congress did intend ERISA to pre-empt State law claims that "relate to" an employee benefit plan, even if the defendant is a nonfiduciary. However, the decision below nullifies the intent of Congress and the resulting conflict of authority should be resolved by this Court. For all of these reasons, this Court should issue a writ of certiorari to the Court of Appeals of Maryland to review the important federal question here presented.

Respectfully submitted,

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December 13, 1991

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 165

September Term, 1990

RICHARD SHOFER

v.

THE STUART HACK COMPANY, *et al.*

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki, JJ.

Opinion by Rodowsky, J.

Filed: September 17, 1991

This case presents issues of exclusive federal jurisdiction and of federal preemption of state law under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 through 1461. The action is brought by a retirement plan participant against a nonfiduciary consultant to the plan for loss, including liability for income taxes, interest and penalties, allegedly

caused by tax advice negligently rendered by the consultant concerning loans from the plan.

I

ERISA preemption is created by a section in that statute providing that, with certain exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1988).[1] This provision has been called "undoubtedly . . . the most expansive preemption clause found in any federal statute." Conison, *The Federal Common Law of ERISA Plan Attorneys*, 41 Syracuse L. Rev. 1049, 1083 (1990). "State law" is defined in ERISA as "all laws, decisions, rules, regulations, or other State action having the effect of law." § 1144(c)(1). The Supreme Court has given the phrase "relate to" its "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389, 85 L. Ed. 2d 728, 740 (1985) (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d 490, 501 (1983)). Indeed, some courts hold that ERISA preempts state common law remedies even though the result leaves the plaintiff with no remedy under ERISA either. *See, e.g., Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757-58 (5th Cir. 1990) (state law action for negligent misrepresentation preempted, despite possible lack of remedy in ERISA, where retired employees sued former employer for additional benefits provided under early retirement plan adopted shortly after plaintiffs retired).

On the other hand, there are limits to ERISA preemption. The Supreme Court has stated that "[s]ome state actions may affect employee benefit plans in too tenuous,

[1] Unless otherwise indicated, all statutory references are to Title 29, U.S.C.

remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21. Although the relationships to plans that have come before the Supreme Court frequently have not been "too tenuous, remote, or peripheral" to avoid preemption, there is a body of authority from other courts holding no preemption of state law claims that have *some* relationship to an ERISA benefit plan.

The subject matter jurisdictional issue in the instant matter involves § 1132(e)(1). It reads:

> "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter [Protection of Employee Benefit Rights §§ 1001 through 1168] brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The exception gives state and federal courts concurrent jurisdiction over a "civil action . . . brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." § 1132(a)(1)(B).

II

Petitioner, Richard Shofer (Shofer), is an automobile dealer. He is the sole stockholder and president of Catalina Enterprises, Inc. (Catalina), which trades as Crown Motors. In 1971 Catalina adopted a pension plan which qualified under the Internal Revenue Code. Shofer was and is the plan's sole trustee.

Respondent, Stuart Hack (Hack), a Chartered Life Underwriter, is the president of respondent, The Stuart

Hack Company (Hack Co.). Respondents are pension plan consultants. They prepared the Catalina plan and amendments thereto. Hack Co. acts as a professional plan administrator, and it is the administrator of the Catalina plan.[2] Respondents routinely rendered professional assistance to Catalina. This included advising Shofer or Catalina as to the tax implications of transactions that they were contemplating. That was a normal part of the business relationship between respondents, Shofer, and Catalina.

Sometime prior to August 9, 1984, Shofer had a telephone conversation with Hack concerning the use of funds in Shofer's account or accounts in the Catalina plan, either by way of a loan from the plan, or as security for a loan. Hack replied in a four-paragraph, single-spaced, full-page letter of August 9, 1984. Shofer's position in the instant litigation is that Hack failed to advise Shofer of the income tax consequences of borrowing from the plan.

In nine transactions between August 9, 1984, and September 30, 1986, Shofer borrowed $375,000 from the Catalina plan. Shofer used the loan proceeds to repay loans from Catalina, t/a Crown Motors, and to purchase and refurbish a property in the Virgin Islands.

Subsequently, Catalina's and Shofer's accountants, Grabush, Newman & Company, P.A. (Grabush), advised Shofer of income tax liability based on those loans. Shofer paid to the United States and to the State of Maryland for the years 1984, 1985 and 1986 income taxes, penalties, and interest totaling $120,428.19 because proceeds of the loans from the plan constituted income to him in those years. Shofer also incurred other consequential expenses.

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[2] "Administrator" is a defined term in ERISA. It means "the person specifically so designated by the terms of the instrument under which the plan is operated; [or] the plan sponsor . . . ." § 1002(16)(A).

Shofer sued Hack and Hack Co. in the Circuit Court for Baltimore City. Hack and Hack Co. impleaded Grabush as a third-party defendant. Shofer's claims eventually were stated in a second amended complaint. During the evolution of that pleading the parties engaged in discovery.

Shofer's second amended complaint is in eight counts. Counts I and II are Maryland law claims, sounding in tort and in contract, for malpractice. Count III alleges a special relationship of trust and confidence to have existed between Shofer and the respondents, giving rise to a fiduciary duty which was breached by the allegedly incomplete advice. Counts IV through VIII are expressly predicated on breaches of the ERISA plan. The compensatory damages sought under the ERISA counts are the same as those sought in the Maryland law causes of action.

In support of their motion to dismiss, respondents argued that the first three counts of the second amended complaint were predicated on Maryland common law which was preempted by ERISA. Thus, those counts did not state a claim upon which relief could be granted because the underlying substantive law relied on for the theory of the cause of action could not be applied to the claim. Respondents argued that the ERISA-based causes of action could be asserted only in a federal court. Respondents further submitted that, because all of the counts essentially involved a breach of fiduciary duty, the federal courts had exclusive subject matter jurisdiction over all of the counts. The parties, both in their memoranda filed in, and in their oral arguments to, the circuit court went well beyond the four corners of the second amended complaint. They made free use of facts contained in discovery which appeared in the circuit court record. The joint record extract in this Court contains discovery material and an affidavit. Accordingly, we shall treat respondents' motion to dismiss as one for summary judg-

ment, governed by Maryland Rule 2-501. *See* Md. Rule 2-322(c).

The circuit court dismissed Shofer's complaint with prejudice in its entirety.[3] Shofer appealed to the Court of Special Appeals. We issued the writ of certiorari on our own motion prior to consideration of this matter by the Court of Special Appeals.

The docket of the Circuit Court for Baltimore City reflects that no judgment has ever been entered disposing of the third-party claim by respondents against Grabush. Nor was the circuit court asked to certify its dismissal of Shofer's second amended complaint as a final judgment pursuant to Maryland Rule 2-602. Thus, this case could be dismissed as a premature appeal. *See Estep v. Georgetown Leather Design*, 320 Md. 277, 577 A.2d 78 (1990). Nevertheless, we exercise our discretion under Maryland Rule 8-602(e)(1)(C) and hereby enter as a final judgment the judgment of the Circuit Court for Baltimore City dismissing all of Shofer's claims.

III

For purposes of this appeal the respondents are not fiduciaries under the Catalina plan.[4]

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[3] After the circuit court's dismissal Shofer filed a complaint in the United States District Court for the District of Maryland. The district court granted summary judgment for Hack because the claim was barred by the ERISA statute of limitations, § 1113. Shofer v. Stuart Hack Co., 753 F. Supp. 587 (D. Md. 1991). We were advised at oral argument of this matter that the district court judgment has been appealed to the United States Court of Appeals for the Fourth Circuit.

[4] Indeed, Shofer sought voluntarily to dismiss without prejudice Counts III through VIII of the second amended complaint, thereby eliminating all counts but those alleging Maryland common law, nonfiduciary duties. The consent of the other parties was required under Maryland Rule 2-506. That consent was not obtained.

Section 1002(21)(A), in relevant part, provides that

> "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation. . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

Absent such discretionary authority, a person is not a plan fiduciary. *See* 29 C.F.R. § 2509.75-8, at 327 (1991).[5]

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[5] 29 C.F.R. § 2509.75-8 is a series of questions and answers promulgated by the Secretary of Labor relating to certain aspects of fiduciary responsibility under ERISA. It includes the following at ¶D-2:

> "Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:
>
> (1) Application of rules determining eligibility for participation or benefits;
>
> (2) Calculation of services and compensation credits for benefits;
>
> (3) Preparation of employee communications material;
>
> (4) Maintenance of participants' service and employment records;
>
> (5) Preparation of reports required by government agencies;
>
> (6) Calculation of benefits;
>
> (7) Orientation of new participants and advising participants of their rights and options under the plan;
>
> (8) Collection of contributions and application of contributions as provided in the plan;
>
> (9) Preparation of reports concerning participants' benefits;
>
> (10) Processing of claims; and

In the instant matter Hack, on deposition, said that he did not have control over, and exercised no discretion over, either the plan or the plan's assets. But it is not clear from the record precisely what Hack's responsibilities were. He clearly was a consultant to the plan. Both parties also characterize him as a "plan administrator." Counsel for the respondents represented to the circuit court at one hearing in this matter that the respondents' role with respect to the Catalina plan was to "fill out forms . . . provide annual reports to employees, that sort of thing."

There are appellate cases holding that certain professionals who gave advice to, or performed ministerial services for, ERISA plans were not fiduciaries. *See, e.g., Pappas v. Buck Consultants Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991) (actuary who gave bad advice to plan held not a fiduciary); *Anoka Orthopaedic Assocs. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990) (attorney who

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(11) Making recommendations to others for decisions with respect to plan administration?

"A: No. Only persons who perform one or more of the functions described in section [1002(21)(A)] with respect to an employee benefit plan are fiduciaries. . . ."

Paragraph D-3 of the same regulation, however, reads in part:

"Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

"A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section [1002(21)(A)]. For example, a plan administrator or a trustee of a plan must, b[y] the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section [1002(21)(A)(iii)]. Persons who hold such positions will therefore be fiduciaries."

Respondents do not contend before us that they are fiduciaries of the Catalina plan as a matter of law.

performed "ministerial tasks" not a fiduciary); *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1151 (3d Cir. 1989) (independent accounting firm that performed audits for ERISA plan not a fiduciary); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988) (attorney for company who "reviewed" its plan not a fiduciary because he "did not exercise authority" over the plan). But there is "no *per se* rule that prevents professionals who render advice to an ERISA plan from becoming fiduciaries." *Pappas*, 923 F.2d at 538. *Compare Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 988 n.5 (4th Cir.) (plan administrator is clearly a fiduciary), *cert. denied*, —— U.S. ——, 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990) and *U.S. Steel Mining Co. v. District 17, United Mine Workers*, 897 F.2d 149, 152 (4th Cir. 1990) (same) *with Narda, Inc. v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F. Supp. 685, 694-95 (D. Md. 1990) (question of fact whether administrators were fiduciaries).

The record before us does not reveal enough about Hack's duties as "administrator" to resolve on summary judgment whether Hack was a fiduciary. Respondents' brief to us admits that "Hack's fiduciary status is not clear in the instant case . . . ." Brief for Appellees, Stuart Hack and The Stuart Hack Company at 32. Under these circumstances there is a genuine dispute of material fact on this issue. Consequently, our analysis proceeds by treating the respondents as nonfiduciary consultants to the plan.

IV

Respondents submit, and the circuit court necessarily concluded, that the Maryland law of negligence and contract, as the foundation for the claims asserted in Counts I and II, "relate[s] to [Catalina's] employee benefit plan," and is preempted by § 1144(a). Shofer contends that the Maryland law of contract and tort affects Catalina's benefit plan "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to'

the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21. The law of ERISA preemption has been called a "'morass,'" *Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F. Supp. 926, 929 (W.D. Ark. 1990), and a black hole which swallows up garden variety claims, *Jordan v. Reliable Life Ins. Co.*, 716 F. Supp. 582, 583 (N.D. Ala. 1989), *modified*, 922 F.2d 732 (11th Cir. 1991).

A recent illustration in the Supreme Court of preemption is *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Texas recognized an abusive discharge action where the employer's motive was to defeat the employee's ERISA-protected pension rights. Because "[t]he Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan," the cause of action was preempted. —— U.S. at ——, 111 S. Ct. at 483.

Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988), illustrates a relationship between state law and a plan which does not result in preemption. The creditor of a plan participant garnished credits held by plan trustees for the participant. The Court first held that ERISA preempted a special Georgia statute that exempted ERISA benefits from garnishment. "The state statute's express reference to ERISA plans suffice[d] to bring it within the federal law's pre-emptive reach." *Id.* at 830, 108 S. Ct. at 2185. Next, the Court addressed whether the entire Georgia garnishment procedure was preempted, if used to seize ERISA benefits. Because specific provisions of ERISA contemplate judgments against plans, *e.g.*, in favor of a beneficiary for benefits, the Court reasoned that Congress must have intended for judgments to be enforceable by state law collection procedures, as provided by the Federal Rules of Civil Procedure. The Court further said:

> "ERISA plans may be sued in a second type of civil action, as well. These cases—lawsuits against

> ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan—are relatively commonplace. Petitioners . . . concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA [§ 1144(a)]."

486 U.S. at 833, 108 S. Ct. at 2187 (footnote omitted).

Out of the "morass" the decision which emerges as factually the most relevant to the case before us is *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146 (3d Cir. 1989). The plaintiffs were trustees of an ERISA plan. In a federal district court they sued the accounting firm that had performed for the plan several of the yearly audits which are required by § 1023(a)(3)(A). Alleging that the auditors had failed to uncover fraud exceeding $1 million by the fund administrator, the plan trustees presented four different legal theories: (1) violation of duties expressly imposed by ERISA on plan fiduciaries; (2) breach of a duty of care implied from ERISA; (3) state law breach of contract; and (4) state law negligence. Dismissal of the complaint by the district court was affirmed. The appellate court held that the auditors were not fiduciaries, and the court would not imply a cause of action. The result was to relegate the plaintiffs to state court on their state law claims. Perhaps intending to influence the future state court action, the United States Court of Appeals for the Third Circuit, in considered *dicta*, said:

> "We acknowledge appellants' argument that ERISA's broad preemption provision, 29 U.S.C. § 1144(a), preempts state professional malpractice claims as they relate to ERISA, but we are not persuaded by it.

> "[Here the Court quoted the passage, set forth above, from *Mackey v. Lanier Collection Agency & Serv.*]
>
> "We feel that professional malpractice actions brought by a plan are directly analogous to the situation in *Mackey*, and that, in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area. Thus, we conclude that ERISA does not generally preempt state professional malpractice actions."

879 F.2d at 1153 n.7. *See also Pappas v. Buck Consultants, Inc.*, 923 F.2d at 540 & n.1 (in *dicta*, apparently agreeing with *Painters* that ERISA does not preempt certain state law claims for malpractice).

We agree with the foregoing reasoning and shall apply it here.

Neither the auditors in *Painters* nor the respondents here are fiduciaries. The state law liability of the auditors in *Painters* would not have turned on, and that of the respondents does not turn on, the construction, interpretation or application of ERISA or of a plan; rather, those liabilities depend on duties arising from the nonfiduciary relationships. But in *Painters* the plaintiff was the plan itself, and any recovery would have become an asset of the plan. That was not enough, however, for the state common law underlying the malpractice claims to "relate to" the plan. Here, Shofer is a plan participant, but he seeks to recover, for himself, personal funds expended for individual tax liabilities and consequential expenses. The state law claims of Counts I and II of Shofer's second amended complaint are not as "related to" a plan as were the state law claims in *Painters*.

Most of the decisions which bear a factual analogy to the instant matter reach the same result as did *Painters*.

See Capital Mercury Shirt Corp. v. Employers Reinsurance Corp., 749 F. Supp. 926 (W.D. Ark. 1990) (state law action against administrator for negligence in providing information to medical reinsurer not preempted, in part because ERISA would not provide a federal law remedy against a nonfiduciary administrator); *Quigley v. Unum Life Ins. Co.*, 688 F. Supp. 80 (D. Mass. 1988) (state law claims against nonfiduciary insurer for incorrectly calculating amount of monthly annuity not preempted because relationship to pension plan too tenuous), *aff'd*, 887 F.2d 258 (1st Cir. 1989); *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 264 Cal. Rptr. 740 (1989) (state law action by trustees of plan against stockbrokers for breach of fiduciary duty in handling plan assets not preempted, in part because duty from broker to customer exists independently of relationship to the plan); *Sappington v. Covington*, 108 N.M. 155, 768 P.2d 354, 357-58 (Ct. App. 1988) (state law action against insurance agents for negligently selecting an insolvent insurer not preempted because "grounded upon alleged conduct . . . that has no reference to ERISA" and damages would not come from ERISA funds), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989), *cert. denied*, 490 U.S. 1107, 109 S. Ct. 3159, 104 L. Ed. 2d 1021 (1989).

The United States Court of Appeals for the Fourth Circuit in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989), pointed to a number of factors in that case which led the court to conclude that certain state law claims were not preempted. The plaintiffs had been terminated by their employer, allegedly in breach of an oral contract for employment to age sixty-two. These same facts were pleaded as negligent misrepresentation as well. The plaintiffs also contended that there had been an unauthorized amendment of the pension plan, but that claim was held to be preempted. The breach of contract and misrepresentation claims, however, were not preempted. The court reasoned:

> "The claims here would not submit Bethlehem to conflicting employer obligations and variable standards of recovery, determine whether any benefits are paid[,] nor directly affect the administration of benefits under the plan. The claims do not bring into question whether Plaintiffs are eligible for plan benefits, but whether they were wrongfully terminated from employment after an alleged oral contract of employment for a term. In their state law claims, the Plaintiffs seek from the corporation compensatory damages for wages and pension, health, life and disability benefits that they would have been entitled to had the alleged contract to work until age 62 not been breached. If the Plaintiffs prevail, the damages would be measured in part by the lost pension benefits the Plaintiffs would have received, but the pension trust itself would not be liable and the administrators of the pension plan would not be burdened in any way."

Id. at 120-21 (internal quotations and citation omitted). These factors apply with greater force to Shofer's state law claims. If Shofer is successful in this action, his damages will not be measured by a difference in plan benefits. Part of those damages will be measured by the obligation incurred for tax and interest, a figure derived from the Internal Revenue Code on the amounts borrowed from the Catalina plan, and part will be expenses consequential to that tax obligation.

Another reason why the dicta in *Painters* is persuasive is that, if the subject tax advice malpractice claim is sufficiently closely related to the Catalina plan to be preempted, there may well not be any remedy at all—not even if asserted under ERISA in an action timely filed in a federal court. This is because there can be a gap between the scope of ERISA remedies and the sweep of ERISA preemption.

Where the relationship between state law and a plan triggered preemption, courts have struggled with the

problmes created by this gap. In some cases, the courts have let the claim, recognized only under preempted state law, fall into the abyss. For example, in *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), the plaintiff sued under state law for breach of an alleged oral contract under which Goodrich promised that the plaintiff would receive certain retirement benefits if he left the company's employment and opened a Goodrich retail franchise. The Goodrich retirement plan did not provide for the promised benefits. The Fifth Circuit held that there was no ERISA-based remedy, because "an oral agreement cannot be the basis of a cause of action under ERISA," *id.* at 1297, and that the state law oral contract claim was preempted.

In other cases courts have approached the gap from the ERISA remedy rim, and attempted to narrow the gap by enlarging ERISA remedies. Enlargement has involved a creative approach to equitable remedies under ERISA, and the fashioning of a body of federal common law underlying ERISA.

An impetus for the equitable remedy approach is Justice Brennan's concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). The lower courts had decided that ERISA preempted a cause of action, based on California law, for damages for emotional upset caused by negligent delay in processing a claim for benefits under an ERISA health plan. The Court held that no cause of action for negligent delay in claim processing was implied under ERISA. Justice Brennan, joined by three other members of the Court, pointed out that no cause of action had been asserted under § 1132(a)(3). That subsection recognizes a civil action brought

> "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to

redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

The concurring justices suggested that traditional trust-law remedies for breaches of fiduciary duties imposed by ERISA on plan administrators might be the basis for recovering extra-contractual damages as "appropriate equitable relief."

This suggestion was adopted by the United States Court of Appeals for the Sixth Circuit in *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2256, 114 L. Ed. 2d 709 (1991). The plaintiff, a retirement plan participant, directed the trustee to "roll over" the participant's assets from the plan into a self-directed individual retirement account. The trustee did this in four distributions, two in one calendar year and the other two in the succeeding calendar year. As a result the plaintiff lost the benefit of income tax deferral on $168,000, and was subjected to state and federal tax liabilities of $87,000. The participant sued in a federal court, asserting an ERISA based claim. His complaint was dismissed. The appellate court, sitting in a three judge panel, held that this claim for extra-contractual damages could be recognized against a fiduciary as an equitable remedy under § 1132(a)(3). One judge concurred, but questioned whether, at trial, it could be proved that the fiduciary's duty extended to minimizing the exposure of plan participants to taxation. One judge dissented.

The approach in *Warren v. Society Nat'l Bank* does not apply to the case before us because of the genuine dispute over whether respondents are fiduciaries.

Enlargement of ERISA remedies by federal common law is illustrated in Judge Murnaghan's opinion for the court in *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, —— U.S. ——, 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990). The plaintiff insurance company administered the employer's self-funded

benefit plan. The defendant was a participant who allegedly had been overpaid medical benefits. Thus, prior to ERISA the claim would have been a garden variety, state law based action for restitution that would inure to the plan. The court held that this claim, although preempted if asserted under state law, was recognized by federal common law. As such it was within the federal question subject matter jurisdiction of the federal courts. The court cautioned, however, that federal common law would be applied only to issues of "central concern" to ERISA. Whether the respondents in the case before us had, and breached, a duty to advise Shofer of the tax consequences of borrowing from the Catalina plan is not of "central concern" to the policies underlying, or administration of, ERISA.

Where, as here, the claim is against a nonfiduciary, some courts approach the problem from the preemption rim and close the gap by holding that there is no preemption of state law because there is no ERISA remedy against a nonfiduciary. *See, e.g., Southern Cal. Meat Cutters Unions & Food Employers Pension Trust Fund v. Investors Research Co.*, 687 F. Supp. 506, 509-10 (C.D. Cal. 1988); *Munoz v. Prudential Ins. Co. of Am.*, 633 F. Supp. 564, 570-72 (D. Colo. 1986). Other courts hold that § 1132(a)(3) allows equitable relief against fiduciaries and nonfiduciaries, so that claims against a nonfiduciary are preempted. *See, e.g., Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 417-18 (9th Cir. 1990) (nonfiduciary administrator); *Casper Air Serv. v. Sun Life Assurance Co. of Canada*, 752 F. Supp. 1005, 1009 (D. Wyo. 1990) (same).

The respondents in the instant matter rely on *Casper Air*. That was an action by plan trustees who had become liable to the plan to cover losses allegedly caused by the defendant's failure accurately to calculate lump sum benefits due to terminated employees, by the failure to terminate the plan upon notice from the trustees, and

by under-funding of the plan's liabilities. Assuming, *arguendo*, that *Casper Air* correctly decides the scope of the remedy under § 1132(a)(3), the negligence of the administrator in that case is more closely related to the plan than is the claim of negligent tax advice to a participant concerning borrowings from a plan that is presented here.

This nonexhaustive survey demonstrates the wisdom of the *Painters* rationale. When respondents' nonfiduciary status is considered along with the conduct at issue and the type of damages sought, we do not believe that Congress could have intended to preempt this particular action. The conduct at issue here is simply a failure to give competent tax advice about an ERISA distribution. If Congress intended to preempt such conduct against nonfiduciaries, then arguably a tax adviser with *no* relationship to an ERISA plan who negligently advised a client that an ERISA distribution was nontaxable would be immune from liability. Moreover, the damages sought are simply the amounts Shofer personally expended because of the allegedly negligent failure to advise. It is hard to imagine that Congress intended to preempt an action in which all potential damages would be paid by a nonfiduciary and would not inure to a plan. Where the alleged negligence of a nonfiduciary plan administrator is as removed from the plan as here, and "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area." *Painters*, 879 F.2d at 1153 n.7.

V

The respondents have argued that certain features of this case make Shofer's claim, based on Maryland malpractice law, related to the plan. Our holding in Part IV, *supra*, that the malpractice claims in Counts I and

II are not preempted, denies preemptive effect to those features, with one exception, to be discussed in Part V(B), *infra*.

A

Respondents' most sweeping contention is that the malpractice claim is preempted because it was necessary for Hack to read the Catalina plan in order to determine whether borrowing by a participating employee from one or more of that employee's accounts was even permitted. That a state law claim involves reading of the plan cannot be the litmus test for preempton. There was no preemption of the Georgia garnishment procedure in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 108 S.Ct. 2182, despite the fact that one would have to read a plan in order to determine the amount which a participant could withdraw from the plan at, and, perhaps, following service of the garnishment.

Respondents also argue that their conduct is regulated by ERISA. We have shown in Part III, *supra*, that this record does not support a holding, as a matter of law, that the respondents occupy a fiduciary relationship to the plan. Viewing the respondents as nonfiduciaries, their conduct, particularly with respect to tax advice to a participant, is not regulated by ERISA.

Shofer's malpractice claim, respondents further submit, affects the plan assets, so that preemption operates. By this contention respondents do not mean that any recovery by Shofer will be from plan assets, as opposed to assets of the respondents, but that Shofer's borrowings from the plan in some way have jeopardized, imperiled or adversely affected the Catalina plan. Assuming, *arguendo*, that such a relationship between a state law claim and a plan preempts the claim, the record extract in this case does not demonstrate such a relationship beyond genuine dispute as to material fact.

B

The respondents urge preemption of the malpractice claims because they attempt to include, or preserve, contingent damages by way of additional taxes that might be imposed by 26 U.S.C. § 4975 (1988), if the Internal Revenue Service were to rule that the loans to Shofer were "prohibited transactions" as therein defined. The argument is based on a paragraph in the second amended complaint which contains allegations incorporated by reference into Counts I and II. Those allegations are:

> "Because these borrowings were in fact taxable to Shofer as income and also constituted prohibited transactions and premature distributions, Shofer incurred and continues to incur substantial federal and state tax liabilities and risk of additional liabilities as a result of these transactions."

In answers to interrogatories requesting that the damages be specified, Shofer included in his answer a category headed "Contingent liabilities," which included: "[d]isqualification of plan"; "[c]ost of 'undoing' prohibited transactions"; and "[e]xcise tax on prohibited transactions." Further, Shofer's expert witness on liability, in his deposition, referred to the potential of plan disqualification that would generate substantial tax consequences which "would visit themselves upon [Shofer] and upon the other plan participants."

At oral argument in this Court counsel for Shofer said that the respondents' argument concerning prohibited transactions was based on the expert's deposition. Shofer's counsel submitted that "if the Court reads Counts I and II, there is no mention of prohibited transactions. There is no mention of excise taxes for prohibited transactions." We consider Shofer's counsel's statement to be a concession limiting the scope of the damages claimed in Counts I and II so as to exclude the three above-described "con-

tingent liabilities." As so limited, potential plan disqualification as a basis for respondents' argument is not in the case.

VI

Shofer also argues that the Circuit Court for Baltimore City had concurrent jurisdiction over Counts IV through VIII,[6] which are styled as breaches of various duties of care under the terms of the ERISA plan itself. The theory in these counts is most clearly articulated in Count VII, which alleges that under ¶ 11.2(c) of the plan, "all representatives of Catalina 'shall use ordinary care and diligence in the performance of their duties pertaining to the Plan . . . .'" These allegations, Shofer submits, seek "to enforce his rights under the terms of the plan" within the meaning of § 1132(a)(1)(B), and are therefore within the concurrent subject matter jurisdiction of state courts pursuant to § 1132(e).

We read Shofer's argument with respect to Counts IV through VIII essentially as an alternative pleading; that is, Shofer argues that even if Hack is determined to be an ERISA fiduciary, a state court has concurrent jurisdiction under § 1132(a)(1)(B) to enforce breaches of duties of care so long as those duties are written into the terms of the plan. This argument proves too much, because it could make any claim for breach of ERISA fiduciary duties subject to concurrent jurisdiction. Section 1104(a)(1)(B) provides that an ERISA fiduciary

> "shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

[6] Shofer makes no argument that Count III, styled as a "Breach of fiduciary duty" under Maryland law, is not preempted by ERISA. We therefore treat that Count as preempted.

This provision, which preempts state fiduciary-obligation law relating to ERISA fiduciaries, creates duties for which liability is imposed by § 1109(a).[7] A civil action for appropriate relief under § 1109 is a civil action recognized by § 1132(a)(2), which § 1132(e)(1) assigns to exclusive federal subject matter jurisdiction. If the plan draftsperson can create "rights under the terms of the plan," for § 1132(a)(1)(B) purposes, by referring in the plan to duties on fiduciaries that are already imposed by ERISA, drafting could negate the deliberate allocation to exclusive federal jurisdiction of cases based on a fiduciary's breach of the duty to use due care. This conferral of exclusive subject matter jurisdiction on the federal courts seems clearly to be part of the congressional intent to have a nationally uniform standard of care applied to ERISA fiduciaries. Breach of a duty of care stated in a plan does not give rise to an action "to enforce . . . rights under the terms of the plan" within the meaning of § 1132(a)(1)(B).

VII

We shall therefore affirm the judgment of the Circuit Court for Baltimore City on Counts III through VIII of the second amended complaint, vacate that judgment as to Counts I and II, on which the damages sought are limited as aforesaid, and remand this case for further proceed-

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[7] Section 1109(a) in relevant part reads:

"Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter [Protection of Employee Benefit Rights, §§ 1001 through 1168] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

ings, consistent with this opinion, on Counts I and II only.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS, CONSISTENT WITH THIS OPINION, ON COUNTS I AND II ONLY OF THE SECOND AMENDED COMPLAINT. COSTS TO BE PAID ONE-HALF BY THE PETITIONER AND ONE-HALF BY THE RESPONDENTS.

APPENDIX B

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

Case No. 88102069/CL7993

SHOFER

versus

THE STUART HACK COMPANY, *et al.*

October 12, 1990

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

Before:

THE HONORABLE DAVID ROSS, JUDGE

Appearances

On Behalf of the Plaintiff:

ANTHONY PALAIGOS, ESQUIRE

On Behalf of the Defendants:

JANET TRUHE, ESQUIRE
LINDA SCHUETT, ESQUIRE

* * * *

THE COURT: The Defendant Hack's motion to dismiss is granted and the second amended complaint is dismissed without leave to amend.

MS. TRUHE: Thank you, Your Honor.

THE COURT: I think under the broad language of the ERISA Statute as interpreted by the Supreme Court, these claims necessarily relate to ERISA, relate to the pension plan and, therefore, are pre-empted.

Miss Schuett, did you get a copy?

MS. SCHUETT: No, Your Honor.

THE COURT: Pass that down please?

Thank you, folks.

MS. TRUHE: Thank you, Your Honor.

MR. PALAIGOS: Thank you, Your Honor.

(Proceedings concluded.)

CIRCUIT COURT FOR BALTIMORE CITY

Date Printed: 09/28/90

Presiding Judge .....

Courtroom Clerk .....

Stenographer .....

Assignment for Friday October 12, 1990 P19

Case Number—88102069

Case Title—Shofer v. Stuart Hack Company CL79993

Category—Contracts

Proceeding—Motion Hearing—General

* * * *

Hack's motion to dismiss is granted and the second amended complaint is dismissed w/o leave to amend.

Judge Signature ..... Date .....

APPENDIX C

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

Case No. 88102069/CL79993

RICHARD SHOFER,
Plaintiff

v.

THE STUART HACK COMPANY, *et al.*,
Defendants

THE STUART HACK COMPANY, *et al.*,
Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.,
Third Party Defendant

SECOND AMENDED COMPLAINT

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., files this Second Amended Complaint.

Facts Common to All Counts

1. The Stuart Hack Company is a corporation organized under the law of Maryland which holds itself out as professional actuaries and consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

2. Stuart Hack is an attorney licensed to practice in Maryland and is an employee of the Stuart Hack Company and holds himself out as a professional actuary and consultant who provides professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

3. Richard Shofer ("Shofer") is the sole stockholder and president of Catalina Enterprises, Inc. t a Crown Motors ("Catalina").

4. Catalina Enterprises, Inc. Pension Plan (the "Plan") is a qualified pension plan established by Defendants in 1971 for employees of Catalina.

5. At all relevant times, Shofer was the Plan's sole trustee.

6. From 1971 through 1985, The Stuart Hack Company prepared certain of the Plan's annual federal returns as well as its statements to participants.

7. During the course of their relationship with Catalina, Shofer, and the Plan, Defendants held themselves out as expert in the tax aspects of pension planning and frequently rendered advice in this area.

8. Based on this course of dealing and on Defendants' representations as to their expertise, Shofer reasonably expected that any possible tax consequences resulting from their advice would be brought to his attention by Defendants.

9. By December 31, 1983, Shofer had accumulated $209,415.95 in his own voluntary account in the Plan.

10. At some time prior to August 9, 1984, Shofer sought Defendants' advice as to whether it would be advisable to borrow money from the Plan or to use the Plan's assets as collateral for a loan.

11. Defendants responded with an opinion letter dated August 9, 1984, stating that Shofer could borrow up to

100% of his voluntary account and making no mention of any adverse tax consequences of such a transaction.

12. Reasonably relying on his advice, and not knowing or suspecting that a loan advance could generate liability for income tax, excise tax, or other liabilities, or constitute a premature distribution, or expose the plan to disqualification, Shofer proceeded to borrow $260,000.00 from his voluntary account in the Plan in 1984, $80,000.00 in 1985, and $35,000.00 in 1986.

13. Because these borrowings were in fact taxable to Shofer as income and also constituted prohibited transactions and premature distributions, Shofer incurred and continues to incur substantial federal and state tax liabilities and risk of additional liabilities as a result of these transactions.

14. Shofer has also incurred expenses for accountants, pension consultants, and other professionals to rectify his tax filings.

15. If he had been properly advised by Defendants as to the tax consequences of these transactions, Shofer would not have borrowed from his voluntary account in the Plan.

16. The Stuart Hack Company continued to render incorrect advice concerning the loan transactions as late as December 16, 1986, when The Stuart Hack Company issued a memorandum attempting to persuade Shofer's accountants that the risk of tax liability was very low.

COUNT I

(Negligence)

17. Plaintiff incorporates paragraphs 1 through 16 in this count.

18. At all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in par-

ticular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent actuary and consultant in such business in Maryland in 1984.

19. Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the tax consequences of borrowing from his voluntary account in the Plan.

20. Defendants breached their duty to Shofer by advising him that he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability or endangering the qualification of the plan, when a reasonably competent actuary and professional in this area would have known and advised Shofer he could not legally do so.

21. As a direct and proximate result of the acts and omissions of Defendants Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other expenses and damages he would otherwise not have incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT II

(Breach of contract)

22. Plaintiff incorporates paragraphs 1 through 21 in this count.

23. Shofer hired Defendants to provide Shofer with expert and reasonably competent advice as to the tax consequences of borrowing from Shofer's voluntary account in the Plan.

24. Defendants breached that contract by, among other things, neglecting to inform Shofer that his borrowing against his voluntary account would cause him to incur tax and other liabilities.

25. As a direct and proximate result of the acts and omissions of Defendants, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other liabilities and expenses he would otherwise not have incurred.

WHEREFORE plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT III

(Breach of fiduciary duty)

26. Plaintiff incorporates paragraphs 1 through 25 in this count.

27. Defendants represented to Shofer that Shofer was justified in reposing special trust and confidence in the expertise and competence of Defendants in matters relating to the tax consequences of withdrawals from voluntary pension accounts, and invited Shofer to enter into a special relationship.

28. Shofer relied upon the representation of Defendants that Defendants possessed special expertise and knowledge, and Shofer reposed special trust and confid-

ence in Defendants to advise Shofer as to the tax consequences of borrowing from his voluntary account in the Plan.

29. As a result of the relationship of special trust and confidence between Defendants and Shofer, as alleged herein, Defendants owed Shofer a fiduciary duty.

30. Defendants breached that duty to Shofer by advising him he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability, when a reasonably competent actuary and professional in this area would have advised Shofer he could not do so.

31. As a direct and proximate result of the acts and omissions of Defendants, as alleged herein, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountants' fees, and other liabilities and expenses he would otherwise not have incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifthy Thousand Dollars ($250,000.00) compensatory damages and Two Hundred Fifty Thousand Dollars ($250,000.00) punitive damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT IV

(Enforcement of Participant's right to fiduciary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

32. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

33. Shofer was at all relevant times a Participant in the Plan.

34. Defendants drafted all versions of the Plan that were operative at any relevant times. The intention of Catalina in sponsoring the Plan was to provide for the welfare of Catalina's employees through lawful pension planning, and all the Participants in the Plan were the intended beneficiaries of each and every provision in the Plan.

35. Defendants drafted the version of the Plan that, by its own terms, became effective as of January 1, 1976, although executed on October 18, 1976 (the "1976 Plan"). The 1976 Plan was controlling and effective until such time as it was superseded by the version of the Plan which, by its own terms, became effective retroactively as of January 1, 1984, although executed on March 15, 1985 (the "1984 Plan").

36. Under the terms of the 1976 Plan at Page 13, Paragraph 2.18, the definition of "fiduciary" includes a person who:

a. "exercises any discretionary authority or discretionary control respecting the management of the Plan";

b. "has any . . . discretionary responsibility in the administration of such Plan";

c. "when designated by a named Fiduciary pursuant to authority granted by the Plan, . . . acts to carry out a fiduciary responsibility";

d. "assumes any Fiduciary responsibilities pursuant to Section 16.07, subject to any exceptions granted directly or indirectly by [the ERISA statute] or any Regulations promulgated pursuant to the authority contained therein."

37. Under the terms of the 1976 Plan at Page 54, Paragraph 15.04, Catalina was empowered to retain necessary professional assistance from a "professional administrator."

38. Under the terms of the 1976 Plan at Page 51, Paragraph 15.01, Catalina was empowered to "designate that person or entity to serve as Administrator who shall signify their acceptance of this responsibility in writing as a named Fiduciary of the Plan."

39. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as the plan administrator."

40. Among the duties of the Administrator, listed on Pages 53-54, Paragraph 15.03 of the 1976 Plan, which were delegated to Defendants, were the following duties:

a. "(e) To interpret the provisions of the Plan . . .";

b. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

41. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

42. The delegation of administrative and trust responsibility to Defendants was consistent with the terms of the 1976 Plan at Page 59, Paragraph 16.07, which stated: "Other areas of responsibility not specifically allocated shall be allocated as the Employer, the Administrator and the Trustee may mutually agree."

43. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under

the terms of the Plan to borrow money from his accounts in the Plan.

44. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer *inter alia* that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

45. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

46. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132 (a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT V

(Enforcement of Participant's right to ordinary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

47. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

48. Under the terms of the 1976 Plan at Pages 52-53, Paragraph 15.03, Defendants, in their capacity as Plan Administrator, had the following responsibilities, among others:

a. "to administer the Plan for the exclusive benefit of the Participants and their Beneficiaries";

b. "to determine all questions of interpretation or policy in a manner not inconsistent with this Agreement";

c. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

49. By accepting "full responsibility as the plan administator," Defendants assumed a duty of ordinary care toward all Participants in the exercise of administrative duties set out in the Plan.

50. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

51. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

52. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to use ordinary care, advised Shofer *inter alia* that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

53. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the exercise of ordinary care by the Defendants, who had assumed duties under the terms of the Plan.

54. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132 (a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VI

(Enforcement of Participant's right to fiduciary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

55. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced therein.

56. Under the terms of the 1984 Plan at Page 11-5, Paragraph 11.6, the Administrator and all other persons in a fiduciary capacity with respect to the Plan "shall discharge their duties with respect to the Plan: (i) solely in the interest of the Participants and Beneficiaries and for the exclusive purposes of providing benefits to Participants and their Beneficiaries . . . (ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, . . . and (iv) in accordance with the documents and instruments governing the Plan and the extent [sic] consistent with the provisions of the Retirement Security Act.

57. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(b), the Administrator was granted "power and authority to delegate from time to time by written instrument all or any part of its duties, powers

or responsibilities under the Plan, both ministerial and discretionary, as it deems appropriate, to any person . . . .

58. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as a plan administrator."

59. Among the duties of the Administrator, listed on Page 11-1, Paragraph 11.1 of the 1984 Plan, which were delegated to Defendants, were the following duties:

a. "(i) resolve and determine all disputes or questions arising under the Plan, including the power to determine the rights of Employees, Participants and Beneficiaries . . . and to remedy any ambiguities, inconsistencies or omissions;"

b. "(iii) implement the Plan in accordance with its terms and such rules and regulations."

60. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

61. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer *inter alia* that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

62. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

63. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has

suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132 (a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VII

(Enforcement of Participant's right to ordinary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

64. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

65. By assuming the duties of Plan Administrator as delegated by Shofer (in his capacity as president of Catalina) and as detailed in other Counts, Defendants became a representative of Catalina with respect to Defendants' dealings with Participants.

66. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(c), all representatives of Catalina "shall use ordinary care and diligence in the performance of their duties pertaining to the Plan . . . ."

67. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

68. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty of ordinary care and diligence toward Participants under the terms of the 1984 Plan, advised Shofer *inter alia* that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

69. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the ordinary care and diligence of the Defendants.

70. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

71. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132 (a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VII

(Enforcement of Participant's right to loans under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

72. All of the other allegations and counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

73. As a Participant in the Plan, Shofer had the right to benefit of loans from the Plan pursuant to Paragraph 10.16, beginning on Page 10-12 of the Plan, which states: "Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants."

74. In order to carry out his duty to make such loans, the Trustee is empowered under the terms of the 1984

Plan to "appoint any persons or firms (including but not limited to . . . consultants, professional plan administrators and other specialists) . . . to secure specialized advice or assistance, as they deem necessary or desirable in connection with the management of the Trust . . . ." Page 10-3, Paragraph 10.2(n).

75. Defendants were consultants and professional plan administrators within the meaning of Paragraph 10.2(n), hired by Shofer as Trustee for specialized advice and assistance in the area of tax implications of pension transactions.

76. Shofer as Trustee relied upon Hack to give specialized aid and assistance *inter alia* with regard to the tax aspects of loan transactions from his voluntary account.

77. Therefore, under the terms of the 1984 Plan, Shofer as Participant had the right to expect and rely upon the efforts of all those retained to give specialized advice and assistance in making such loans.

78. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to assist in the making of proper loans under the terms of the 1984 Plan, advised Shofer *inter alia* that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

79. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to borrow from his voluntary account.

80. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

81. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the forms of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132 (a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

/s/ Lloyd S. Mailman
LLOYD S. MAILMAN

/s/ Thomas A. Bowden
THOMAS A. BOWDEN
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Trust Building
2 Hopkins Plaza
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(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 8th day of August, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

/s/ Thomas A. Bowden
THOMAS A. BOWDEN

APPENDIX D

THE STUART HACK COMPANY

Consultants & Actuaries
4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington, D.C. 621-4064

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can

be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

/s/ Stuart Hack
STUART HACK

APPENDIX E

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

Case No. 88102069/CL79993

RICHARD SHOFER,
Plaintiff

v.

THE STUART HACK COMPANY, *et al.*,
Defendants

DEFENDENTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Daniel W. Whitney, Janet M. Truhe and Semmes, Bowen & Semmes, pursuant to Maryland Rule 2-324(b), move this Court for an Order dismissing the Plaintiff's Second Amended Complaint on the following grounds:

1. The common law counts of the Second Amended Complaint (Counts I, II and III) are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), because they "relate to" an employee benefit plan. 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987).

2. The remaining counts of the Second Amended Complaint, which purport to allege claims for failure to provide competent advice concerning the plan in violation of ERISA, fall within the exclusive jurisdiction of the federal courts, and this Court therefore lacks subject matter jurisdiction over these claims. 29 U.S.C. § 1132(e)(1).

WHEREFORE, for the reasons stated herein and in the Memorandum filed herewith, Defendants request that the Plaintiff's Second Amended Complaint should be dismissed with prejudice.

/s/ Daniel W. Whitney
DANIEL W. WHITNEY

/s/ Janet M. Truhe
JANET M. TRUHE

/s/ Semmes, Bowen & Semmes
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 1990, copies of the foregoing Defendants' Motion to Dismiss the Second Amended Complaint, Memorandum in Support, Request for Hearing and Order were hand delivered to Lloyd S. Mailman, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201, and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

/s/ Daniel W. Whitney
DANIEL W. WHITNEY